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In The

Supreme Court of the United States

October Term, 2001

MICHAEL J. MARKOWSKI AND JOSEPH F. RICCIO,
Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The District of Columbia

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Petition for Writ of Certiorari

WILLIAM VANDERCREEK
215 South Monroe Street, Level P3
Post Office Box 1328
Tallahassee, Florida 32302
(850) 561-9147 Telephone/FAX
(850) 893-0719 FAX
Counsel for Markowski and Riccio

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QUESTIONS PRESENTED

PREFACE: The Court of Appeals upheld the S.E.C. ruling concerning non-bona fide bids and manipulation of Mountaintop securities by principals of Global America, the dominant market maker. After the completion of the successful IPO, Global lost over $1.4 million in trading Mountaintop securities the following months. The Court found manipulation had existed based upon "what appears to be Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose." The Court ruled that a proper finding of manipulation would logically and necessarily mean that Global's non-collusive bids, involving real customers, real trades, and real prices, were non-bona fide. The Questions Presented are:

Whether the ruling manipulation can be illegal solely because of the actor's purpose conflicts with decisions by this Court requiring, among other matters, scienter and deception that are in accord with determinations by Congress.

Whether the ruling that manipulation can be found based solely on the subjective determination of the actor's intent effectively transfers the burden of proof for manipulation and for non-bona fide bids to Petitioners who must disprove any wrongdoing.

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OPINIONS BELOW

The final decision of the National Adjudicatory Council of the NASD Regulation, Inc. was filed on July 13, 1998. The Application for Appeal to the S.E.C. was filed on August 7, 1998. The Decision and Order of the Securities and Exchange Commission was filed on September 7, 2000. (Appendix A). A timely Motion for Reconsideration was denied with stated reasons by the Order filed on November 1, 2000. (Appendix B). The Petition for Review was filed in the United States Court of Appeals for the District of Columbia on November 15, 2000.

The opinion of the United States Court of Appeals for the District of Columbia is reported at *Michael J. Markowski and Joseph F. Riccio v. S.E.C.*, 274 F.3d 525 (D.C. Cir. 2001) (Appendix C). The District of Columbia Court denied the Petition for Rehearing on February 25, 2002, (Appendix D).

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia was entered on December 21, 2001. The timely Petition for Rehearing was denied on February 25, 2002. This Petition for Certiorari has been filed within ninety (90) days from the denial of Rehearing. This Court has jurisdiction under 28 U.S.C. §1254 and Supreme Court Rule 13.

STATUTES AND REGULATIONS

Section 9(a)(1) and (2) of the Securities Exchange Act, 15 U.S.C. § 78i(a)(1) and (2):

§ 78i. Manipulation of security prices

(a) Transactions relating to purchase or sale of

security. It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange or in connection with any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the

purpose of inducing the purchase or sale of such security by others.

NASD Rule 3310:

3310. Publication of Transactions and Quotations

No member shall publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such member believes that such quotation represents a bona fide bid for, or offer of, such security. If nominal quotations are used or given, they shall be clearly stated or indicated to be only nominal quotations.

STATEMENT OF THE CASE

1. NASD Proceedings

National Association of Securities Dealers, NASD, Inc. (NASD) initiated proceedings against Markowski and Riccio on August 7, 1992 by filing a Notice of Complaint No. CMS920091. Markowski was the owner of Global America and Riccio was the Chief Trader. Global was a full service brokerage and investment banker with an emphasis on supporting emerging growth companies. The proceedings before the Market Surveillance Committee eventually

resulted in all charges being upheld and a fine and permanent bar being imposed.[1]

In a *de novo* review, the National Adjudicatory Council vacated and reversed all charges concerning the sale and marketing of securities with the exception of non-bona fide bids and manipulation of Mountaintop securities. Markowski was also held responsible for the violation of the restriction agreement and to be at fault for rescheduling interviews. The permanent bar was upheld, but the increased fines were reduced to $300,000.00 for Markowski and $250,000.00 for Riccio. All other claims of manipulation and wrongdoing were dismissed for failure to present any competent proof.

2. *S.E.C. Proceedings*

Markowski and Riccio filed an application for review before the S.E.C. Jurisdiction existed under 15 U.S.C. 78s(d)(2) and (e)(2). After all briefs were filed the S.E.C. directed the NASD to respond to issues that had been raised

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[1] At the initial hearing, Markowski was not represented by counsel and was refused permission to participate in the hearing by telephone. The Market Surveillance Committee found Markowski and Riccio to have violated all charges made and filed an opinion essentially repeating the conclusions alleged in the charges. Markowski was fined $300,000 and Riccio was fined $250,000. On review, the National Committee vacated and remanded expressly allowing Markowski to participate by telephone. The revised hearing was then held June 12, 13, 14, 28, 1995. Markowski this time appeared in person with counsel and Riccio appeared without counsel by telephone. Substantial testimony was presented and additional documents introduced into the record. Approximately one year after the hearing had concluded, the Market Surveillance Committee filed substantially the same opinion repeating the charges as before, but increased the fine ten fold for Markowski from $300,000 to $3 million and four fold for Riccio $250,000 to $1 million. The opinion did not explain the basis of the surcharge for Markowski being allowed to participate in the proceeding. The NASD took an additional year to prepare the record for presentation and review by the National Adjudicatory Council. Markowski's motion to dismiss and vacate the charges because of delay and failure to prosecute was rejected.

in the Markowski briefs, but had not been answered by the briefs of the NASD. Both parties filed additional briefs. The NASD had relied upon a Chronological Transaction Analysis and a Retrospective Net Capital Analysis. Markowski and Riccio disputed the accuracy of these analyses. The S.E.C. agreed that the analyses were unreliable and so recognized in its decision. Although the S.E.C. noted the NASD had not been able to support its arguments, the S.E.C. on its review of the record upheld the charges of non-bona fide bids and manipulation against Markowski and Riccio by finding that "the bids for Mountaintop *were* published with the manipulative purpose of keeping Mountaintop prices at an artificially high level." App. A-6.

The S.E.C. also recognized, contrary to the NASD, that Global did not profit on its trading in Mountaintop securities. App. A-5. The profit prong for scienter and manipulation did not exist. Global lost over $700,000 in this trading and over $1.4 million from trading after the opening day of the IPO. The NASD had erroneously calculated profit of $2.5 million on opening day and an overall profit of more than one million dollars by not considering the cost of converting warrants to stock for the sales involved.

The basis of the S.E.C.'s opinion finding the bids were not bona fide was its belief that the Mountaintop securities had been "manipulated" to an "artificial price level" by inventory purchases and sales by Global as the dominant market maker. Other than the assertion of manipulation, the S.E.C. did not find any other basis for contending the bids were not bona fide. The bids were not ficticious or colliusive and resulted in real trades with real customers at real prices. The S.E.C. sustained the charges against Markowski concerning the restriction agreement and delays in rescheduling interviews. The S.E.C. denied, with an opinion, Markowski and Riccio's timely request for reconsideration.

The trading records of Global for Mountaintop securities and the 10Ks and 10Qs for Mountaintop are in evidence. The records show approximately 1,900 trades of Mountaintop by Global during the review period from the issuing of the IPO on June 29, 1990 to the closing of Global's doors on January 15, 1991. The opening day of the IPO reflects the following: market maker NAWE placed the first bid for Mountaintop stock at $3.50, followed soon thereafter by DBLL's bid of $4.50. Six market makers placed bids as high as $6 before Global entered its first bid of $5.50. Global did not move its bid from $5.50 on the first day even though five other market makers had closing bids higher than that with the market bid closing at $6.50. The trading records reflect that the bids concerning Mountaintop securities were real in all respects -- real customers, real transactions, real money and real stock. No evidence to the contrary was introduced. The bids were not found to be false, fictitious, phantom, collusive, or the result of cross-trading.

Trading records of Mountaintop units and Mountaintop stock show a general decline paralleling that of the NASDAQ market index. These records reflect trades above and below, but close to this index. Far from purchasing excess blocks of Mountaintop stock in the inventory, the records reflect that in late November and December 1990, Global sold an aggregate of 150,000 Mountaintop Units and 350,000 shares Mountaintop common in eight large transactions for a total price of over $1 million. These sales were out of the inventory. The record indicates a significant liquidation of Mountaintop securities during December of 1990.

3. *Proceedings Before the United States Court of Appeals for the District of Columbia*

The decision of the Court of Appeals for the District of Columbia affirmed the S.E.C. ruling on December 21, 2001. *See Michael J. Markowski and Joseph P. Riccio v. S.E.C.*, 274 F.3d 525 (D.C. Cir. 2001), reprinted in Appendix C.

Petitioners argued to the Court of Appeals that the S.E.C. ruling relied upon a circular thesis that the bids were non-bona fide because the stock was manipulated and that the stock was manipulated because the bids were non-bona fide. This merry-go-round resulted in reciprocating self-proving charges that had the effect of placing the burden on Petitioners to disprove both charges.

In response to Petitioners' merry-go-round argument, the Court of Appeals expressly proclaimed that proof of non-bona fide bids would logically follow from proof of manipulation.[2] Petitioners did not dispute that actual proof of manipulation would satisfy the charge of non-bona fide bids. Petitioners, however, contended it would also logically follow that the mere charge or allegation of non-bona fide bids could not be used as the basis to prove the stock was manipulated. The opinion expressly noted that bids involved real trades and were not fictitious or collusive, but rejected any suggestion that this proved the conduct was lawful.[3]

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[2] We note at the cutset that the charge of publishing non-bona fide quotations flowed fairly ineluctably from the finding of manipulation:

Michael J. Markowski and Joseph P. Riccio v. S.E.C., 274 F.3d 525, 528 (D.C. Cir. 2001)(App. C-3-4).

[3] Petitioners first seem to argue that because Global's bids and trades in this case were "real"--they involved real customers, real transactions, and real money--the trades cannot be classified as an unlawful manipulation. Indeed, Global's activities were unlike classic schemes using fraudulent devices such as "wash sales" or "matched sales" in which the targeted securities are "traded" back to the sellers themselves or among known parties to give a false appearance of sales and market interest. See, e.g., *SEC v. U.S. Environmental, Inc.*, 155 F.3d 107, 109 (2d Cir. 1998); see also Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 1045-

The court ruled manipulation was proven because:

> we cannot find the Commission's interpretation to be unreasonable in light of what appears to be Congress's determination that "manipulation" can be illegal solely because of the actor's purpose.

Michael J. Markowski and Joseph P. Riccio v. S.E.C., 274 F.3d 525, 529 (D.C. Cir. 2001)(App. C-5).

There was no other finding regarding manipulation, or scienter or profit-making or deception. As noted, the opinion recognized that the charge of non-bona fide bids in this case was dependent upon the finding of manipulation.

Noteworthy, the Court of Appeals opinion candidly recognized the issues upon which it based its manipulation ruling raise "interesting questions:"

> Liability for manipulation wholly independent of fictitious transactions in fact raises interesting questions. Without such transactions, the core of the offense can be obscure. It may be hard to separate a "manipulative" investor from one who is simply overenthusiastic, a true believer in the object of investment. Both may amass huge inventories and place high bids, even though there are scant objective data supporting the

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> 46 (4th ed. 2001) (describing the typical manipulative scheme). On the basis of this distinction, petitioners argue--rather summarily--that their conduct must have been lawful.

Michael J. Markowski and Joseph P. Riccio v. S.E.C., 274 F.3d 525, 528 (D.C. Cir. 2001)(App. C-4).

> implicit estimate of the stock's value. Legality would thus depend entirely on whether the investor's intent was "an investment purpose" or "solely to affect the price of [the] security." United States v. Mulheren, 938 F.2d 364, 368 (2d Cir. 1991). Given the typical ambiguity of intent, commentators have suggested that imposing liability may chill investors from transactions that actually contribute to the efficiency of securities markets. Daniel R. Fischel & David J. Ross, "Should the Law Prohibit 'Manipulation' in Financial Markets?," 105 Harv. L. Rev. 503, 523 (1991) (expressing concerns about the manipulation doctrine's overdeterrence effects); see also Mulheren, 938 F.2d at 368 (expressing misgivings about basing 10b-5 violations purely on whether or not a "transaction is effected for an investment purpose").

Michael J. Markowski and Joseph P. Riccio v. S.E.C., 274 F.3d 525, 528 (D.C. Cir. 2001)(App. C-4).

REASONS WHY CERTIORARI SHOULD BE GRANTED

The District of Columbia's opinion conflicts with decisions of this Court and other courts of appeal. The Court of Appeals rejected the concept of profit-making and scienter as elements of manipulation as well as the requirement for deception that are required by rulings of this Court.

The crux of the District of Columbia Court's reasoning in upholding manipulation is concisely stated in the opinion. After summarizing Petitioners' argument that the bids and trades were real and did not involve any of the traditional schemes recognized as being unlawful and manipulative, the court proclaimed:

These arguments, however, are of little use to Markowski and Riccio. Whatever the practical concerns, **we cannot find the Commission's interpretation to be unreasonable in light of what appears to be Congress's determination that "manipulation" can be illegal solely because of the actor's purpose.** See *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Section 9(a)(2) of the Securities Exchange Act, 15, U.S.C. § 78i(a)(2), manifests this idea by declaring it unlawful.

> [t]o effect . . . a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

Id. This provision is quite separate from the subsections of § 9 prohibiting manipulation through fraudulent devices such as wash sales, 15 U.S.C. § 78i(a)(1)(A), matched sales, *id.* at § 78i(a)(1)(B)-(C), and false statements, *id.* at § 78i(a)(4). Given Congress's clear endorsement for sanctions against this sort of manipulation, the Commission's inclusion of it within the phrase "manipulative . . . device" in § 10(b), *id.* at § 78j(b), cannot have been unreasonable. (footnote omitted), (emphasis added)

Michael J. Markowski and Joseph P. Riccio v. S.E.C., 274 F.3d 525, 529 (D.C. Cir. 2001)(App. C-5-6).

Petitioners agree with the District of Columbia Court's implicit recognition that a finding of manipulation in this case cannot be based upon "subsection of §9 prohibiting manipulation through fraudulent devices such as 'wash sales'...". The finding of manipulation in this case is apparently based upon the Court's pronouncement concerning "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose." Whether Congress has so determined, or not, is critical to the court's holding below. This issue is of great public importance. This Court should grant certiorari.

A charge of manipulative purpose is not self-proving and this purpose must be manifested by violative conduct and not by subjective speculation of mental processes. In accordance with rulings of this Court, and what Petitioners believe is in accord with Congress's purpose, Petitioners would suggest that the critical language "can be" requires a requisite proof of scienter and deception before manipulation can be found.

The Supreme Court has recognized and proscribed the meaning of "manipulation" and the Commission may not re-interpret it now. This is not a *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) issue. It is a question of applying the valid legal standard promulgated by the Supreme Court in requiring scienter and deception for a finding of securities manipulation. Congress has not proclaimed a different standard.

The scope of Rule 10b-5 and NASD regulations (IM-3310) are limited by the statutory language of Section 10(b) and Supreme Court interpretations. Scienter is a necessary element, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), but in itself is not a sufficient element. The conduct involved must also be deceptive, id. at 199; cf. *Schreiber v. Burlington*

Northern, Inc., 472 U.S. 1 (1985)(14(e)). The Supreme Court stated in *Santa Fe. Indus. Inc. v. Green*:

> "Manipulation" is "virtually a term of art when used in connection with securities markets." *Ernst & Ernst*, 425 U.S., at 199. The term refers generally to practices, such as wash sales, matched orders, or rigged prices that are intended to mislead investors by artificially affecting market activity. See, e.g., § 9 of the 1934 Act, 15 U.S.C. § 78i (prohibiting specific manipulative practices); *Ernst & Ernst*, supra, at 195, 199 n. 21, 205; *Piper* v. *Chris-Craft Industries, Inc.*, ante, at 43 (Rule 10b-6, also promulgated under § 10(b), is "an antimanipulative provision designed to protect the orderliness of the securities market during distributions of stock" and "to prevent stimulative trading by an issuer in its own securities in order to create an unnatural and unwarranted appearance of market activity"); 2 A. Bromberg, Securities Law: Fraud § 7.3 (1975); 3 L. Loss, Securities Regulation 1541-1570 (2d ed. 1961); 6 id., at 3755-3763 (Supp. 1969). Section 10(b)'s general prohibition of practices deemed by the SEC to be "manipulative" - in this technical sense of artificially affecting market activity in order to mislead investors - is fully consistent with the fundamental purpose of the 1934 Act "'to substitute a philosophy of full disclosure for the philosophy of caveat emptor....'" *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972), quoting *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Indeed, nondisclosure is usually essential to the success of a manipulative scheme. 3 Loss, supra, at 1565. No doubt Congress meant to

> prohibit the full range of ingenious devices that might be used to manipulate securities prices. But we do not think it would have chosen this "term of art" if it had meant to bring within the scope of § 10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary.

Santa Fe. Indus. Inc. v. Green, 430 U.S. 462, 476-77 (1977).

Manipulation, as the word is used for securities violations, requires deception. As noted in *Schreiber*, the Supreme Court has also defined 'manipulation' in the §14(e) context, and noted that §14(e) was closely modeled on 10-b-5:

> We hold that the term "manipulative" as used in § 14(e) requires misrepresentation or nondisclosure. It connotes "conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst* v. *Hochfelder*, 425 U.S., at 199. Without misrepresentation or nondisclosure, § 14(e) has not been violated.

Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 10 (1985).

The fully disclosed conduct of Global was not deceptive. The bid/ask price for Mountaintop was disclosed, the trading volume was disclosed, and Global was not recording fictitious trades which would deceive anyone about the level of activity. As this Court recognized, Section 9 and Rule 10b-18 are inapposite to the case at bar. The essential difference between "manipulation" and what Global did isn't just that Global did not invent transactions, but that Global did not hide its identity or time its purchases to affect a closing price without disclosing that practice. The charge is not that Global's activities were hidden, and therefore deceptive, but that they were improperly

motivated -- but that is simply not the test. Impure thoughts do not turn fully disclosed conduct --i.e. non-fraud -- into fraud. Actual trades of selling stocks and buying stocks that in someone's opinion was too high is not fraud—even if in hindsight the price was too high.

Petitioners concur with the District of Columbia Court's observation in its opinion that a proper finding of manipulation is required for a violation of NASD Rule 3310 and that a finding of manipulation is essential to a ruling that the bids in this case were not bona fide:

> **We note at the outset that the charge of publishing non-bona fide quotations flowed fairly ineluctably from the finding of manipulation:** Rule 3310 bars publishing or causing to be published, reports of a transaction as a purchase or sale of securities unless the NASD member believes the "such transaction was a bona fide purchase or sale"; an interpretation of Rule 3310 by the NASD Board of Governors, IM-3310, reads the rule as embracing the case of a member who causes a quotation to be published "without having reasonable cause to believe that such quotation . . . **is not published for any fraudulent, deceptive or manipulative purposes." If the finding of manipulation is supportable,** then the second violation follows handily. (emphasis added)

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Petitioners suggest that the meaning of "manipulation" in Rule 3310 is the same meaning of "manipulation" as endorsed and explained by this Court and as used by Congress. As noted by the Court of Appeals,

the NASD Board of Governors' interpretation requires "deceptive or manipulative purposes."

Petitioners also believe that the District of Columbia seemingly concurred with Petitioners' merry-go-round argument that if the SEC's ruling on non-bona fide bids is based upon the finding of manipulation, that such finding of manipulation cannot be based upon the charge of non-bona fide bids. Nevertheless, Petitioners contend this is precisely the circular reasoning utilized by the S.E.C. that was affirmed by the District of Columbia. The S.E.C.'s case on manipulation is dependent on the S.E.C.'s assumption that the bids were non-bona fide. The S.E.C. case on manipulation assumed the bids were artificial, and not real bids, resulting in real transactions with real customers. Absent the assumed, but unproved charge on non-bona fides, Petitioners contend Supreme Court cases undercut any other basis for affirming the SEC's ruling on manipulation.

As the District of Columbia and the Commission's opinions implicitly recognize, the NASD position of finding scienter and deception through alleged profit-making and the trading of Mountaintop stock was fundamentally flawed.[4] In this case there was no profit-making or attempt to profit in trading. Global, as the dominant market maker, could have abused its powers by lowering its bid during many of the trading days and then increasing the ask when a sale of a large block was imminent. Global did not do so.

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[4] The NASD, in calculating the profits on the sale of stock made from the sale of stock obtained by the conversion of warrants, failed to consider the strike price of the warrant, e.g., the cost of goods sold. The SEC, which at least recognized this major mistake but then incorrectly concluded, without consideration of the trading records in evidence, that Global was buying all of Mountaintop's stocks into a swollen inventory. This concept was debunked by Global's trading records which showed that Global was sometimes short in the stock and that trading for a month was often flat.

The Second Circuit has suggested the absence of a profit making aspect can preclude a finding of manipulation. *See United States v. Mulheren*, 938 F. 2d 364, 370 (2d Cir. 1991)("one of the hallmarks of manipulation is some profit or personal gain inuring to the alleged manipulator").

The District of Columbia found the key to the Commission's finding of manipulation was testimony the market price was supported:

> However compelling the criticisms may be, they are inapposite. The Commission made clear [of the CTA] that its findings of manipulation rested not on the CTA, but on the statements from the firm's own personnel. SEC Denial of Reconsideration at 2. That testimony, which the Commission was entitled to credit, substantially support the Commission's key finding: that the firm bought Mountaintop securities in order to maintain their apparent market price.

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Any purchase of stock supports the market for such stock. This is a principle of economics and not manipulation. This is the job and function of market makers.[5] As recognized by the District of Columbia Court,

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[5] Every over-the-counter dealer who 'specializes' in a security, in the sense that he effects a high percentage of the transactions in the security, and in the sense that he is the principal buyer and seller and is most familiar with the affairs of the issuer and the state of the market, to some extent dominates the market. His trading volume may be the backbone of the market in the security and his determination to pay more or less may be determinative of market movements.

Norris & Hirshberg, Inc., 21 S.E.C. 865, 874-75 (1946), *aff'd sub nom. Norris & Hirshberg, Inc. v. SEC*, 177 F.2d 228 (D.C. Cir. 1949).

this testimony characterizing the purchase of Mountaintop securities does not involve any deceptive act or practice and provides no basis for a finding that Global acted with the necessary scienter. The Opinion notes the testimony of Shanley and others about the opening bids being high and the bids thereafter being "high":

> For example, Shanley testified that Mountaintop securities opened "too high" and remained at high levels only because Global was "always supporting the stock." He further recounted conversations with Markowski in which he argued that supporting a stock against the market was impossible—as the event seemed to prove. And Gary Boccio, Global's compliance officer, testified that Markowski explained his refusal to reduce Global's inventory by saying that "he didn't want to show we had any weakness in the stocks." Indeed, Riccio himself admitted that although there was no demand in the open market, Global made the sole high bid for days, even months, on end.

Michael J. Markowski and Joseph P. Riccio v. S.E.C., 274 F.3d 525, 530 (D.C. Cir. 2001)(App. C-7).

It may be that Shanley honestly believed that other market makers (none of whom were ever claimed to be in any collusion with Global) opened the bid too high on the initial day of trading the IPO. See trading records, page 6, *supra*. Those market makers apparently believed that the offering price of the IPO was too low. The IPO in Mountaintop and all other IPO's done by Global were firm commitment offerings and not "best efforts." Consequently, an IPO that was reasonably priced would be more attractive to the market than an offering that was overpriced. Both the

issuer and the underwriter as investment banker want a successful IPO. Thus, Shanley's and other comments neither proved nor disproved manipulation—neither proof of scienter nor deception.

Shanley also testified:

> A number of reasons. The market itself, the street knew my opinion, if you look at the box, NASDAQ, Global America was always way down there, they were never the first, they were sixth, seven, eight, there were ten market makers, we were six or seventh. But the Street knew that if you came to them with a big block, that we'd buy it.

Testimony of James Shanley, [Joint Appendix p. 1130 for District of Columbia below.]

The speculative problems and indeed the failure of the NASD or S.E.C. to provide both a proper legal standard and record facts in support of such standard is recognized in the District of Columbia Court's Opinion:

> Further, to the extent that the case against liability for "trade-based" manipulation depends on its inherently self-deterring character, petitioners' situation may be distinguishable. The activity in Mountaintop furthered an external purpose. At least in the short term, Global supported Mountaintop's price not to profit from later sales of Mountaintop, but to maintain customer interest in Global generally and to sustain confidence in its other securities. As James Shanley, Global's chief operating officer, testified, petitioner Riccio explained

> his refusal to lower his bid price: "If we do that on one stock, they [presumably, holders of Global's stocks] will hit us on all the stock." Thus, the prospects of losing some money on Mountaintop in the short run would not deter Global from manipulating—if that cost was worth the benefit of keeping its customers and preserving confidence in its other stocks.

Michael J. Markowski and Joseph P. Riccio v. S.E.C., 274 F.3d 525, 529 (D.C. Cir. 2001)(App. C-6).

Trying to please investors and keep customers does not prove manipulation. Global's trading operations on all stocks in which it made a market lost over two million dollars in December of 1990. This was a result of the general market decline and economic depression, a depression that played a significant role in national elections. The market for speculative stocks in new formative companies was over. Global was unable to raise additional capital in December as it had in November resulting in the close of Global.

The assertion of "artificially high prices" was a product of retrospective analysis that Mountaintop had actually traded above its provable true value. This is simply a characteristic of stocks in new formative companies. This Court can note under the S.E.C.'s test for manipulation that was affirmed by the Court of Appeals, all of the "dot com" stocks that opened high, went even much higher, and then collapsed were all manipulated and all bids would be non-bona fide. No further proof would be needed.

One noted commentator discussed the state of disarray of the law that surrounds "manipulation":

> Notwithstanding the recent focus on manipulation, however, no satisfactory definition of the term exists. Indeed, neither

> the Securities Exchange Act nor the Commodities Exchange Act attempts to define the term, even though both have the prevention of manipulation as a primary goal. Academic commentary in this area also has been unhelpful. . . . As one commentator has noted, "the law governing manipulations has become an embarrassment—confusing, contradictory, complex, and unsophisticated." The first formulation [of manipulation], (interference with the free play of supply and demand) is unhelpful because the term "interference" is undefined. Presumably, manipulative conduct constitutes "interference", but **this is circular absent a definition of manipulation**. Moreover, all traders are part of the forces of supply and demand.

Daniel R. Fischel and David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harvard Law Review 503, 506 (1991)(citations omitted)(emphasis added).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

WILLIAM VANDERCREEK
215 South Monroe Street, Level P3
Post Office Box 1328
Tallahassee, Florida 32302
(850) 561-9147 Telephone/FAX
(850) 893- 0719 FAX

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Appendix A

Decision and Order of the Securities and Exchange Commission, September 7, 2000

Appendix A

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 43259 / September 7, 2000
Adm. Proc. File No. 3-9671

In the Matter of the Application of
MICHAEL J. MARKOWSKI
1521 Alton Road #233
Miami Beach, Florida 33139
and
JOSEPH F. RICCIO
2654 Oleander Court
Palm Harbor, Florida 34684
For Review of Disciplinary Action Taken by the
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION --
REVIEW OF DISCIPLINARY ACTION

Violations of Exchange Act and Conduct Rules

Manipulation

Non-bona fide Bid Quotations

Violation of Restriction Agreement

Failure to Cooperate

President of NASD member firm and its trader manipulated the market for securities underwritten by firm, and published non-bona fide bids for those securities. In addition, president was responsible for firm's violation of its restriction agreement with the NASD, and

refused to submit to an NASD investigative interview. Held, association's findings of violation and the sanctions it imposed sustained.

APPEARANCES:

William VanDercreek and W. Scott Newbern, for Michael J. Markowski and Joseph F. Riccio.

Alden S. Adkins, Susan L. Beesley, and Deborah F. McIlroy, for NASD Regulation, Inc.

Appeal filed: August 10, 1998

Briefing completed: August 10, 1999

I.

Michael J. Markowski, who was chairman, chief executive officer, and majority shareholder of Global America, Inc. ("Global" or "the Firm"), a former member of the National Association of Securities Dealers, Inc. ("NASD"), and Joseph F. Riccio, who was Global's trader, appeal from NASD disciplinary action. The NASD found that applicants violated Section 10(b) of the Securities Exchange Act of 1934,[1] Rule 10b-5 thereunder,[2] and NASD Conduct Rules 2110 and 2120[3] by manipulating the market for securities of Mountaintop Corporation. The NASD also found that applicants violated Conduct Rules 2110, 2120, and 3310[4] by publishing non-bona fide bid quotations for Mountaintop; that Markowski violated Conduct Rule 2110 by failing to comply with a restriction agreement between the Firm and the NASD; and that Markowski violated Conduct Rule 2110 and Procedural Rule 8210[5] by refusing to submit to an investigative interview requested by the NASD's staff.

Markowski and Riccio were censured and barred in all capacities from association with any NASD member. In addition, Markowski was fined $300,000, and Riccio $250,000.[6] We base our findings on an independent review of the record.

II.

In 1990, Global underwrote, on a firm commitment basis, an initial public offering ("IPO") of Mountaintop securities. Mountaintop was described in the prospectus as a development stage company formed to market Alaskan vodka. For the year ended December 31, 1989, the company suffered a net loss of $545,873, and it had a year-end working capital deficiency of $175,901. Unaudited figures for the first three months of 1990 showed additional losses and a larger deficiency. According to applicants, Mountaintop was a high-risk company in the formative stage "seeking to establish [its] Wall Street identity."

The Mountaintop offering, on June 29, 1990, comprised 1,200,000 units at a price of $3.50 per unit. Each unit consisted of two shares of common stock and two Class A warrants. Each Class A warrant entitled the holder to purchase one share of common stock and one Class B warrant for $1.875.[7] All of the offering was sold on June 29, almost entirely to customers of Global. Aftermarket trading began that same day, and Global became the primary market maker.

It is clear that Global dominated and controlled the market for Mountaintop securities. Not only was virtually the entire offering sold to Global's customers but, from June 29, 1990 through January 15, 1991 (when Global ceased operations due to a net capital deficiency), the Firm was far and away the largest purchaser and seller of Mountaintop securities.[8] For most of the relevant period, the Firm was either the exclusive high bidder for those securities or shared the high bid. Global withdrew as a market maker before the opening of business on January 16, 1991. On that day, the inside bid for Mountaintop units dropped 75%, the inside bid for Mountaintop common dropped 64%, and the inside bid for Mountaintop Class A warrants dropped 78%.

A promotional brochure issued by Global sheds light on the actions applicants took in the Mountaintop aftermarket. The brochure touts Global as "a full-service investment banker" with a program for the "support of emerging growth companies," for the benefit of investors, "that goes <u>well</u> <u>beyond</u> the traditional underwriting process." (emphasis in original). As amplified by Gary Boccio,

Global's compliance director, the philosophy of the Firm and Markowski was as follows: "You [the investor] buy these stocks for [the] long term. We will support those companies and then your net worth will increase." The record before us shows that, until the Firm collapsed, applicants did support Mountaintop. Their support took two forms; (1) they maintained high bid prices for Mountaintop securities, and (2) absorbed all unwanted securities into inventory, thereby preventing sales from depressing market prices.

James Shanley, Global's chief operating officer, noted that all of Global's IPOs (including Mountaintop) were for start-up companies with no proven product. According to Shanley, Mountaintop securities opened too high and remained at high levels only because Global supported their prices. Shanley stated that, as 1990 went on, Global was "trying to buy all the [IPO securities that were offered to it, thereby] supporting the stock." He testified that, although he warned Markowski that trying to support a stock was almost an impossibility, "anything that came at us we bought."

Shanley gave a similar warning to Riccio, telling him that Global had to start lowering its bids, but Riccio refused to do so. Similarly, Boccio advised Markowski to start selling Global's growing inventories to other broker-dealers. However, Markowski replied that "he didn't want to show . . . any weakness in the stocks." According to figures introduced into evidence by the NASD, Global's sales to other dealers of Mountaintop units, common stock and Class A warrants amounted to less than 5% of its total sales of each of these securities.[9] It is clear that most of Global's Mountaintop sales were made to retail customers, and only a relatively small number to other dealers.

Although Riccio was technically under the supervision of Shanley, he in fact reported directly and exclusively to Markowski. Markowski and Riccio were constantly in touch on all matters affecting Riccio's trading operations, including the size of Global's inventories. Riccio admitted that it was Global's policy to carry large inventory positions in Mountaintop and other IPO securities; that Global was "high bid a lot of the time;" and that the Firm was a "buyer." Riccio further conceded that one of the reasons he did

not drop his bids was fear of customer complaints. When asked why Global was not selling its IPO inventories to other dealers, Riccio replied that Global was following its basic philosophy of financing IPO companies. He stated that he "understood what [his] job was," and never questioned Markowski's approach of trying to support the companies' securities. Markowski himself conceded that, in the latter part of 1990, although the Firm was running out of money, it was still "buying every share that came at it, trying to support the price of the stock." Ultimately, applicants' actions led to Global's net capital deficiency and the Firm's demise.

The price leadership in a security that results from almost exclusive control over the source of supply empowers an underwriter to set prices arbitrarily. We have previously pointed out that, "if that power is abused, the result is a manipulation."[10] Applicants abused Global's control position with respect to Mountaintop. To avoid a manipulation, a controlling dealer's pricing must reflect genuine market conditions. "A dealer may not exploit his ability both to restrict supply in the marketplace (by buying investors' unwanted shares) and charge an arbitrarily high price."[11] That is precisely what Global did here. Global's pricing did not reflect genuine demand, but merely applicants' desire to maintain high price levels, a desire further evidenced by Global's eagerness to purchase every Mountaintop security offered to it despite the Firm's deteriorating financial condition.

Pointing out that Global ultimately lost money on its Mountaintop trading, applicants argue that there is no evidence that they acted with scienter. We do not agree. While profit is the normal goal of manipulators, their actions are not rendered innocent simply because they fail to achieve the desired result.[12] Applicants staked Global's reputation on being an "investment banker" for the companies whose shares it underwrote. Customers were told that all they needed to do was "buy and hold" those securities and, with Global's support, they would be suitably rewarded. Rather than destroy their customers' confidence, applicants chose to keep Mountaintop prices high by manipulating the market for Mountaintop securities. We conclude that Markowski and Riccio acted with the requisite scienter. We accordingly sustain the NASD's findings of violation.[13]

III.

As noted above, the NASD found that applicants violated its rules by publishing non-bona fide bids for Mountaintop securities. Applicants argue that Global's bids were real, not illusory, and resulted in substantial purchases and sales. However, an NASD Board of Governors rule interpretation (IM-3310) provides in relevant part as follows:

"[I]t would be inconsistent with the [pertinent rules] for a member . . . to publish . . . any quotation for any security without having reasonable cause to believe that such quotation . . . is not published . . . for any fraudulent, deceptive or manipulative purpose."

We have found that the bids for Mountaintop were published with the manipulative purpose of keeping Mountaintop prices at an artificially high level. We accordingly sustain the NASD's findings of violation.

IV.

Global was admitted to NASD membership subject to certain restrictions placed on it by the NASD. A restriction agreement, dated May 19, 1989, provided, among other things, that the Firm's total inventory positions must not exceed 200% of its excess net capital. The agreement further provided that its terms could not be changed without the NASD's prior written consent.

In his answer to the NASD's complaint, Markowski admitted that the restriction agreement was violated from September 1, 1990 through January 15, 1991 unless the terms of the original agreement had been altered, as to which Markowski professed ignorance. In fact, the record shows that Markowski signed four amended restriction agreements. All of those amendments retained the above-noted 200% limitation, and the record does not show that any change was ever made in that requirement.

In his briefs on appeal, Markowski concedes that the restriction agreement and its various amendments "may have been violated" and, in Global's closing days, "probably violated." He further admits that, as Global's owner and chief executive officer, he was

"ultimately responsible." However, he argues that Shanley had the primary responsibility for monitoring the Firm's compliance with the agreement.

The chief executive officer of a brokerage firm is responsible for compliance with all of the requirements imposed on his firm "unless and until he reasonably delegates particular functions to another person in the firm and neither knows nor has reason to know" that a problem has arisen.[14] Assuming that "monitoring responsibility" was delegated to Shanley, Markowski was clearly on notice that the Firm was violating its restriction agreement. Shanley testified that Global probably violated the agreement during the course of every month for the last year of the Firm's existence, and that he notified Markowski, only to have the problem recur.

On December 11, 1990, Boccio and Stuart Polansky, Global's chief financial officer, wrote a memorandum to Markowski with respect to Global's "immediate regulatory and financial concerns." The memorandum stated: "You are aware that we are violating our restriction letter for the fourth straight month." On December 12, 1990, Boccio wrote to Markowski expressing his increasing concern regarding the lack of executive support for actions necessary to address "significant compliance issues" facing the Firm, all of which Boccio stated he had raised previously. Among the issues listed was "the daily violation of our NASD restriction letter regarding position limitations."

It is clear the Markowski was aware that his Firm was violating its restriction agreement with the NASD. However, he failed to take the necessary action both to correct the problem as soon as it was brought to his attention and to prevent any recurrence. We accordingly sustain the NASD's finding of violation.

V.

On February 25, 1992, a staff attorney in the NASD's Anti-Fraud Department wrote to Markowski requesting an on-the-record interview on March 5 in connection with the Department's investigation of Global's trading activity. The letter warned Markowski that failure to appear might be grounds for disciplinary action. Counsel for Markowski responded on March 2, stating that

Markowski could not appear on March 5 because he had already made arrangements to attend a seminar in California. In a March 3 telephone conversation with Markowski's counsel, the NASD attorney agreed to postpone Markowski's interview until April 16, based on counsel's assurances that he and Markowski would be present and ready to proceed on that date.

On April 13, 1992, Markowski's counsel wrote to the NASD attorney advising him of counsel's conclusion that Markowski "should not testify at this time." Among the reasons cited for this refusal were a competing investigation by the Commission and Markowski's belief that the NASD's investigation was "nothing more than a personal vendetta." In June, for reasons not disclosed in the record, Markowski's counsel agreed to the interview and it was finally held on June 29.

Markowski argues that the delays he requested were reasonable; that the NASD was not prejudiced thereby; that there was no urgency since Global was no longer in business; and that he ultimately testified in accordance with the NASD's request. We do not consider that these responses justify Markowski's conduct. Markowski and his counsel requested and received a lengthy postponement. Counsel then wrote to the NASD indicating that his client would not testify. The NASD has the right to request information and require cooperation from its members and persons associated with them. Markowski's refusal to testify was in direct conflict with his obligation to do so. His later change of mind does not excuse his action. Unwarranted delay erodes the NASD's ability to carry out its regulatory responsibilities.[15] The determination of when it is appropriate for an investigation to proceed is a matter for the NASD to decide, not the respondent. We accordingly sustain the NASD's findings of violation.[16]

VI.

Applicants argue that, if the charges against them are not dismissed, their sanctions should be limited to short suspensions. We do not agree. Our review of NASD sanctions is governed by Section 19(e)(2) of the Exchange Act, which requires us to determine whether the sanctions are excessive or oppressive or impose an unnecessary burden on competition.[17] Here applicants

engaged in egregious misconduct. As we have previously emphasized:

Manipulation strikes at the heart of the pricing process on which all investors rely. It attacks the very foundation and integrity of the free market system. Thus it runs counter to the basic objectives of the securities laws.[18]

We further note that this is the second time that Markowski has been disciplined for refusing to cooperate with an NASD investigation.[19] With due regard for the public interest, we are unable to conclude that the sanctions imposed by the NASD are excessive or oppressive, or unduly burden competition.

An appropriate order will issue.[20]

By the Commission (Chairman LEVITT and Commissioners

JOHNSON, HUNT, CAREY and UNGER).

Jonathan G. Katz

Secretary

Footnotes

[1] 15 U.S.C. § 78j.

[2] 17 C.F.R. § 240.10b-5.

[3] Conduct Rule 2110 requires the observance of high standards of commercial honor and just and equitable principles of trade. Conduct Rule 2120 proscribes fraud in securities transactions.

[4] Conduct Rule 3310 prohibits the dissemination of any quotation that a member does not believe is bona fide. An NASD Board of Governors interpretation of the pertinent rules (IM-3310) prohibits the dissemination of quotations "for any fraudulent, deceptive, or manipulative purpose."

[5] Procedural Rule 8210 requires persons associated with member firms to report orally with respect to any matter involved in an NASD investigation.

[6] The NASD also assessed costs.

[7] Each Class B warrant entitled the holder to purchase one share of Mountaintop common for $2.75. The Class B warrants are not at issue in this proceeding.

[8] NASD figures comparing Global's purchases and sales of Mountaintop securities with those of other brokers show that, during the relevant period, Global accounted for 82.4% of total unit purchase volume, 68.4% of total common stock purchase volume, and 60.6% of total warrant purchase volume. The brokers with the next highest percentages accounted for, respectively, only 6.3%, 9.1%, and 7.8% of that volume. On the sales side, Global accounted for 53.6% of total unit sales volume, 69.8% of total common stock sales volume, and 54.1% of total warrant sales volume. The brokers with the next highest percentages accounted for, respectively, 12.5%, 6.3%, and 17.3% of that volume. While applicants question whether these figures are wholly accurate, it is clear that Global dominated the market for Mountaintop securities.

[9] Although applicants question the NASD's figures in this regard, the testimony clearly evidences Global's reluctance to sell Mountaintop securities to other dealers. Thus, although we need not rely on the NASD's figures, we consider them to be substantially accurate.

[10] Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd sub nom. Pagel, Inc. v. SEC, 803 F.2d 942 (8th Cir. 1986).

[11] Patten Securities Corporation, 51 S.E.C. 568, 574 (1993).

[12] See R.B. Webster Investments, Inc., 51 S.E.C. 1269, 1274 (1994).

[13] In their briefs on appeal, applicants point to discrepancies between certain numerical data on which the NASD relied and data from Global's records. Although requested to do so, the NASD failed to clarify the matter. Accordingly, we have not relied on the conflicting data in making our findings of manipulation.

[14] See, e.g., Thomas F. White, 51 S.E.C. 1194, 1197 (1994).

[15] Michael David Borth, 51 S.E.C. 178, 180 (1992).

[16] Markowski points to a recent unpublished court decision (Fiero v. SEC (2d Cir., January 20, 1999)) which questioned the authority of the NASD's Market Surveillance Committee ("MSC") to request an investigative interview. That case is inapposite. As noted above, the request to interview Markowski came from a staff member of the NASD's Anti-Fraud Department, acting as agent of the NASD's Board of Governors.
Markowski further contends that the MSC, which initially heard and considered the evidence, was prejudiced against him. We find no evidence of prejudice. We note, moreover, that the MSC's decision was accorded de novo review by both the NASD's National Adjudicatory Council and the Commission.

[17] 15 U.S.C. § 78s(e)(2).

[18] Pagel, Inc., supra, 48 S.E.C. at 231-232.

[19] See Michael Markowski, 51 S.E.C. 553 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994).

[20] We have considered all of the parties' contentions. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 43259 / September 7, 2000

Admin. Proc. File No. 3-9671

In the Matter of the Application of
MICHAEL J. MARKOWSKI
1521 Alton Road #233
Miami Beach, Florida 33139
and
JOSEPH F. RICCIO
2654 Oleander Court
Palm Harbor, Florida 34684
For Review of Disciplinary Action Taken by the
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is ORDERED that the disciplinary action taken by the National Association of Securities Dealers, Inc. against Michael J. Markowski and Joseph F. Riccio, and the Association's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz

Secretary

Appendix B

Order of the Securities and Exchange Commission denying Motion for Rehearing, November 1, 2000

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 43503 / November 1, 2000
Adm. Proc. File No. 3-9671

In the Matter of the Application of
MICHAEL J. MARKOWSKI
1521 Alton Road #233
Miami Beach, Florida 33139
and
JOSEPH F. RICCIO
2654 Oleander Court
Palm Harbor, Florida 34684
For Review of Disciplinary Action Taken by the
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

ORDER DENYING MOTION FOR RECONSIDERATION

On September 7, 2000, we issued an opinion sustaining disciplinary action taken by the National Association of Securities Dealers, Inc. ("NASD") against Michael J. Markowski, who was chairman, chief executive officer, and majority shareholder of Global America, Inc., a former NASD member firm, and Joseph F. Riccio, who was Global's trader.[1] Markowski and Riccio now request reconsideration of our decision.

We found that Markowski and Riccio violated antifraud provisions of the Securities Exchange Act of 1934 and NASD Conduct Rules by manipulating the market for securities of Mountaintop Corporation, and that they also violated those rules by publishing non-bona fide bid quotations for the securities. We further determined that Markowski committed additional rule violations by failing to comply with a restriction agreement between Global and the NASD, and by refusing to submit timely to an investigative interview requested by the NASD's staff. We accordingly

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[1] Michael J. Markowski, Securities Exchange Act Release No. 43259, ___ SEC Docket ___.

sustained the sanctions assessed by the NASD: censures, bars of Markowski and Riccio from association with any NASD member, and the imposition of a $300,000 fine on Markowski and a $250,000 fine on Riccio.

Global was underwriter of an initial public offering ("IPO") of Mountaintop securities, and was the primary market maker in the aftermarket. Applicants argue that our decision would require underwriters of successful IPO's to abandon the marketplace following the offerings. They also argue that our finding that they acted with scienter in manipulating the market for Mountaintop securities and entering improper bids was based on nothing more that the retrospective conclusion that the marketplace had overvalued those securities. These contentions are wholly lacking in substance. Our decision was neither meant to discourage appropriate market making activity nor based on the analysis that Applicants suggest. On the contrary, we concluded that Applicants had deliberately maintained unwarranted price levels for Mountaintop by entering high bids that did not reflect genuine demand and by absorbing all unwanted Mountaintop securities into inventory.

Contrary to Applicants' further assertions, the record fully supports the conclusion that they were reluctant to sell Mountaintop securities to other broker-dealers. In addition, we fully considered Applicants' objections to the NASD's Chronological Transaction Analysis, and determined no to credit numerical data in that Analysis that conflicted with date in Global's records. Moreover, our conclusions with respect to Applicants' manipulation were to a large extent based on the testimony of Global officials and Applicants' own admissions.

Markowski argues that an admission we ascribed to him was actually a statement by another witness.[2] We cannot accept this

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[2] Markowski has filed an affidavit in support of this claim. However, no showing has been made, as required by Rule 452 of our Rules of Practice, that there were reasonable grounds for failing to adduce this evidence previously. Accordingly, we decline to consider the affidavit, and it is excluded from the evidentiary record.

contention. The pertinent transcript of testimony before the NASD's Market Surveillance Committee attributes the statement in question to Markowski, and it does not appear that he ever made any effort to correct that transcript. Moreover, there is other testimony in the record to the same effect.

Markowski further contends that he had no "evil intent" to violate the restriction agreement, and he claims that the NASD agreed to extend the time for his investigative testimony. No proof of scienter was required to establish Markowski's violation of the restriction agreement,[3] and, despite receiving an extension of time, Markowski refused to testify in the NASD's investigation on the rescheduled date.

We have considered the additional arguments raised by Applicants, and find them equally lacking in merit. Accordingly, IT IS ORDERED that the motion for reconsideration filed by Michael J. Markowski and Joseph F. Riccio be, and it hereby is, denied.

By the Commission.

Jonathan G. Katz
Secretary

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[3] NASD Conduct Rule 2110 merely requires the observance of high standards of commercial honor and just and equitable principles of trade.

Appendix C

Michael J. Markowski and Joseph F. Riccio v. S.E.C., 274 F.3d 525 (D.C. Cir. 2001), December 21, 2001

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 6, 2001 Decided December 21, 2001

No. 00–1480

MICHAEL J. MARKOWSKI AND
JOSEPH F. RICCIO,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

Petition for Review of Orders of the
Securities and Exchange Commission

William VanDercreek argued the cause and filed the briefs for petitioners.

Susan S. McDonald, Senior Litigation Counsel, Securities & Exchange Commission, argued the cause for respondent. With her on the brief were *David M. Becker*, General Counsel, *Meyer Eisenberg*, Deputy General Counsel, *Jacob H. Stillman*, Solicitor, and *Susan K. Straus*, Attorney.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Petitioners Michael J. Markowski and Joseph F. Riccio seek review of a Securities and Exchange Commission order sustaining a disciplinary action taken by the National Association of Securities Dealers ("NASD"). The order imposed liability under Rule 10b–5 for manipulating the stock market and under certain NASD Conduct Rules for causing the publication of "non-bona fide" bid quotations. The SEC also found against Markowski but not Riccio for violations of a restriction agreement governing his firm's inventory holdings and for failure to cooperate with an NASD investigation. *In re Markowski*, Exchange Act Release No. 43,259 (SEC Decision Sept. 7, 2000) ("SEC Decision"). We affirm the Commission's order.

* * *

Markowski was the chairman, CEO, and majority shareholder of Global America, Inc., then an NASD-member firm that specialized in emerging growth companies. Riccio was Global's trader. In June 1990 Global underwrote an initial public offering of Mountaintop Corporation, an Alaskan vodka producer. The Mountaintop securities included common stock, warrants and "units" (each of which could be exchanged for two shares of common stock and two warrants). Because the SEC does not rest its conclusions on data as to quantities involved, the relationships among these securities need not detain us. In "aftermarket" trading (i.e., after the IPO), Global dominated the market for Mountaintop securities, accounting for an overwhelming majority of both purchase and sale volume.

From the IPO in June 1990 until Global's closing in January 1991, Global supported the price of Mountaintop securities. The SEC said that this support took two forms: Global (1) maintained high bid prices for Mountaintop securities, and (2) absorbed all unwanted securities into inventory, thereby

preventing sales from depressing market prices. *In re Markowski*, Exchange Act Release No. 43,503, at 2 (SEC Decision Nov. 1, 2000) ("SEC Denial of Reconsideration"). In the end these efforts proved unsustainable. Global closed its doors in January 1991, and Mountaintop's price dropped precipitously—about 75% in one day. *Id.*

In July 1998 the NASD's National Adjudicatory Council ("NAC") held Markowski and Riccio in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b–5 thereunder, 17 C.F.R. § 240.10b–5, and NASD Conduct Rules 2110, 2120, 3310 for their activities in Mountaintop. Specifically, the NAC found that Markowski and Riccio had engaged in manipulative, deceptive, and fraudulent conduct, and had published non-bona fide quotations. The NAC also found that Markowski had violated the terms of Global's Restriction Agreement and had refused to submit to an NASD investigative interview.

By way of remedy, the NAC ordered that Markowski and Riccio be censured and barred in all capacities from association with any member of the NASD, and that they be fined $300,000 and $250,000, respectively. See Final Order of the National Adjudicatory Council, NASD Regulation, Inc., No. CMS920091, at 1–2 (July 13, 1998).

On appeal, the SEC sustained the NAC's findings and sanctions. SEC Decision at 1. The SEC later denied petitioners' motion for reconsideration. SEC Denial of Reconsideration at 3. Markowski and Riccio now seek review.

* * *

We note at the outset that the charge of publishing non-bona fide quotations flowed fairly ineluctably from the finding of manipulation: Rule 3310 bars publishing, or causing to be published, reports of a transaction as a purchase or sale of securities unless the NASD member believes that "such transaction was a bona fide purchase or sale"; an interpretation of Rule 3310 by the NASD Board of Governors, IM–3310, reads the rule as embracing the case of a member who causes a quotation to be published "without having reasonable cause

to believe that such quotation ... is not published for any fraudulent, deceptive or manipulative purpose." If the finding of manipulation is supportable, then the second violation follows handily.

Petitioners first seem to argue that because Global's bids and trades in this case were "real"—they involved real customers, real transactions, and real money—the trades cannot be classified as an unlawful manipulation. Indeed, Global's activities were unlike classic schemes using fraudulent devices such as "wash sales" or "matched sales" in which the targeted securities are "traded" back to the sellers themselves or among known parties to give a false appearance of sales and market interest. See, e.g., *SEC v. U.S. Environmental, Inc.*, 155 F.3d 107, 109 (2d Cir. 1998); see also Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 1045–46 (4th ed. 2001) (describing the typical manipulative scheme). On the basis of this distinction, petitioners argue—rather summarily—that their conduct must have been lawful.

Liability for manipulation wholly independent of fictitious transactions in fact raises interesting questions. Without such transactions, the core of the offense can be obscure. It may be hard to separate a "manipulative" investor from one who is simply overenthusiastic, a true believer in the object of investment. Both may amass huge inventories and place high bids, even though there are scant objective data supporting the implicit estimate of the stock's value. Legality would thus depend entirely on whether the investor's intent was "an investment purpose" or "solely to affect the price of [the] security." *United States v. Mulheren*, 938 F.2d 364, 368 (2d Cir. 1991). Given the typical ambiguity of intent, commentators have suggested that imposing liability may chill investors from transactions that actually contribute to the efficiency of securities markets. Daniel R. Fischel & David J. Ross, "Should the Law Prohibit 'Manipulation' in Financial Markets?," 105 Harv. L. Rev. 503, 523 (1991) (expressing concerns about the manipulation doctrine's overdeterrence effects); see also *Mulheren*, 938 F.2d at 368 (expressing misgivings about basing 10b–5 violations purely on whether or not a "transaction is effected for an investment purpose").

Commentators have also suggested that where manipulative behavior is solely defined in terms of the actor's purpose, it may well be self-deterring as a general matter, so that any need for an external sanction is slight. Purely "trade-based" manipulation schemes, in which the manipulator simply buys a security in order to induce higher prices and then sells to take advantage of the price change, are likely to fail. First, it is difficult unilaterally to cause price to rise. Second, it is even more difficult to sell subsequently at a price high enough to cover both purchase costs *and* transaction costs. For one thing, if the actor's purchases are such as to give the market a material upward thrust, his later sales may equivalently drive it down. See Fischel & Ross, *supra*, at 512–19. But see Steve Thel, "$850,000 in Six Minutes—The Mechanics of Securities Manipulation," 79 Cornell L. Rev. 219 (1994) (suggesting that manipulators may profit from very small, short-lived price changes).

These arguments, however, are of little use to Markowski and Riccio. Whatever the practical concerns, we cannot find the Commission's interpretation to be unreasonable in light of what appears to be Congress's determination that "manipulation" can be illegal solely because of the actor's purpose. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984). Section 9(a)(2) of the Securities Exchange Act, 15 U.S.C. § 78i(a)(2), manifests this idea by declaring it unlawful

> [t]o effect ... a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

Id.[1] This provision is quite separate from the subsections of § 9 prohibiting manipulation through fraudulent devices such as wash sales, 15 U.S.C. § 78i(a)(1)(A), matched sales, *id.* at

[1] 15 U.S.C. § 78i has been slightly altered since Global's closure in 1991, but those amendments are irrelevant in this proceeding.

§ 78i(a)(1)(B)-(C), and false statements, *id.* at § 78i(a)(4). Given Congress's clear endorsement for sanctions against this sort of manipulation, the Commission's inclusion of it within the phrase "manipulative ... device" in § 10(b), *id.* at § 78j(b), cannot have been unreasonable.

The Commission's interpretation is also consistent with its rules governing an issuer's purchases of its own securities. See Securities Exchange Act of 1934, Rule 10b–18, 17 C.F.R. § 240.10b–18. Issuer repurchases are perfectly real transactions. But the Commission has created a safe harbor measured in terms of timing, volume, and price; purchases outside the safe harbor are subject to possible enforcement action as manipulations. See Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor, 47 Fed. Reg. 53,333 (1982).

Further, to the extent that the case against liability for "trade-based" manipulation depends on its inherently self-deterring character, petitioners' situation may be distinguishable. The activity in Mountaintop furthered an external purpose. At least in the short term, Global supported Mountaintop's price not to profit from later sales of Mountaintop, but to maintain customer interest in Global generally and to sustain confidence in its other securities. As James Shanley, Global's chief operating officer, testified, petitioner Riccio explained his refusal to lower his bid price: "If we do that on one stock, they [presumably, holders of Global's stocks] will hit us on all the stocks." Thus, the prospects of losing some money on Mountaintop in the short run would not deter Global from manipulating—if that cost was worth the benefit of keeping its customers and preserving confidence in its other stocks.

Apart from their conceptual attack on liability for manipulation where the trades are "real," petitioners argue that Global's $1,400,000 net loss on Mountaintop precludes any finding of scienter. In the alternative, they say that these losses in Mountaintop at least cut against a finding of manipulation. Neither variation is persuasive. Just because a manipulator loses money doesn't mean he wasn't trying. In-

deed, as suggested above, attempts to support a price for an ulterior purpose seem unlikely to prevail if success will take a long time—protracted struggle against market fundamentals will exhaust the manipulator's resources.

Petitioners' third claim asserts that some of the evidence before the Commission was so defective that the Commission's findings lack substantial evidence. They point to possible infirmities in the NASD's Chronological Transaction Analysis ("CTA"), which the NASD used to support its findings that Global's bid prices were higher than needed to acquire the stock, and that its inventories of Mountaintop securities were larger than could be explained by a genuine investment intent. However compelling the criticisms may be, they are inapposite. The Commission made clear that its findings of manipulation rested not on the CTA, but on the statements from the firm's own personnel. SEC Denial of Reconsideration at 2. That testimony, which the Commission was entitled to credit, substantially supports the Commission's key finding: that the firm bought Mountaintop securities in order to maintain their apparent market price.

For example, Shanley testified that Mountaintop securities opened "too high" and remained at high levels only because Global was "always supporting the stock." He further recounted conversations with Markowski in which he argued that supporting a stock against the market was impossible—as the event seemed to prove. And Gary Boccio, Global's compliance officer, testified that Markowski explained his refusal to reduce Global's inventory by saying that "he didn't want to show we had any weakness in the stocks." Indeed, Riccio himself admitted that although there was no demand in the open market, Global made the sole high bid for days, even months, on end. (Global evidently was able to offload much of the Mountaintop stock that it acquired on special "clients" of Markowski, whose role—victims? coconspirators? some other class?—neither side in this litigation has seen fit to explain.) Riccio said that he maintained Global's bids because he feared a drop in price and the customer complaints it would generate.

Finally, Markowski challenges the SEC's findings that he violated Global's restriction agreement by maintaining inventory positions exceeding 200% of Global's excess net capital, and that he refused to submit to an NASD investigative interview. Markowski acknowledges the ancillary character of these issues, however, and asks for relief regarding them only if we find no basis for the principal manipulation charge. Since we find that sufficient grounds support the manipulation charge, we need not reach these issues.

In any event, the arguments are unconvincing. Substantial evidence, including testimony from Shanley and a memorandum from Boccio, support the SEC's finding that Markowski knew about Global's continuing violations of the restriction agreement. See, e.g., *Patrick v. SEC*, 19 F.3d 66, 69 (2d Cir. 1994). Similarly, the SEC reasonably found that Markowski's eventual acquiescence in an NASD request for an interview two months after his scheduled interview and four months after NASD's initial request neither qualified as "full and prompt cooperation" nor was sufficient to cancel his prior recalcitrance. *In re Borth*, 51 S.E.C. 178, 180–81 (1992) (discussing the importance of timely cooperation with NASD investigations); *In re Williams*, 50 S.E.C. 1070, 1072 (1992) (holding that litigation concerns did not excuse delays in cooperation).

* * *

The order of the SEC is

Affirmed.

Appendix D

Order Denying Petition for Rehearing,
February 25, 2002

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1480 **September Term, 2001**

Filed On:

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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CLERK

Michael J. Markowski and Joseph F. Riccio,
Petitioners

v.

Securities and Exchange Commission,
Respondent

BEFORE: Randolph and Garland, Circuit Judges; Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for rehearing filed February 4, 2002, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

Supreme Court, U.S.
FILED
AUG 6 2002

No. 01-1749

In the Supreme Court of the United States

MICHAEL J. MARKOWSKI AND
JOSEPH F. RICCIO, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GIOVANNI P. PREZIOSO
General Counsel
MEYER EISENBERG
Deputy General Counsel
JACOB H. STILLMAN
Solicitor
SUSAN S. MCDONALD
Senior Litigation Counsel
SUSAN K. STRAUS
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

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QUESTION PRESENTED

Whether securities transactions that are made with the undisclosed intent to maintain the market price at an artificially high level and thereby to create the false appearance of genuine investor demand are proscribed by Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

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In the Supreme Court of the United States

No. 01-1749

MICHAEL J. MARKOWSKI AND
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v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C8) is reported at 274 F.3d 525. The opinion and order of the Securities and Exchange Commission (Pet. App. A1-A12) are reported at 73 SEC Docket 475. The Commission's order denying petitioner's motion for reconsideration (Pet. App. B1-B3) is reported at 73 SEC Docket 1520.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2001. A petition for rehearing was denied on February 25, 2002 (Pet. App. D1). The petition for a writ of certiorari was filed on May 28, 2002 (Tuesday, following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

From 1990 to 1991, petitioners Michael J. Markowski, chairman and chief executive officer of Global America, Inc., a securities brokerage firm, and Joseph F. Riccio, the firm's head trader, engaged in a scheme to manipulate the market in the securities of Mountaintop Corporation—securities Global had encouraged its customers to buy and hold for future appreciation. Pursuant to the scheme, Global, which was the principal market maker for Mountaintop securities during that time, maintained high bid prices and absorbed all unwanted securities into inventory, in order to prevent the price of Mountaintop from falling and to maintain the confidence of Global's customers in the firm's investment recommendations. Pet. App. A3-A5, C2-C3, C6.

The National Association of Securities Dealers, Inc. (NASD), brought a disciplinary action against petitioners in which it found that petitioners violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, by manipulating the market for Mountaintop securities and also violated various NASD rules. See Pet. App. A2. Petitioners were censured and barred from association with any NASD member firm in any capacity. In addition, petitioner Markowski was ordered to pay a fine of $300,000, and petitioner Riccio was order to pay $250,000. *Ibid.* Petitioners sought review of the NASD's decision before the Securities and Exchange Commission (SEC or Commission), which sustained the NASD's findings and the sanctions that it had imposed. *Id.* at A1-A12. The SEC subsequently denied petitioners' motion for reconsideration.

Id. at B1-B3. The court of appeals affirmed the Commission's order. *Id.* at C1-C8.

1. The NASD is a national securities association registered with the Commission under Section 15A of the Exchange Act, 15 U.S.C. 78o-3. The NASD has substantial responsibility under the Act, subject to comprehensive oversight by the Commission, for regulation of those who sell securities in the over-the-counter market. The Exchange Act requires the NASD to adopt rules to regulate the conduct of its member brokerage firms and associated persons and to enforce its rules through the imposition of disciplinary sanctions. See 15 U.S.C. 78o-3(b)(6), (7) and (8), 78o-3(h), 78s(g). Pursuant to the statute, the NASD has promulgated rules that require adherence to the federal securities laws and to specified standards of professional conduct.

Disciplinary action taken by the NASD is subject to review by the Commission on application by the aggrieved party. 15 U.S.C. 78s(d)(2), 78s(e)(1). The Commission is required to conduct a *de novo* review of the record and to make its own findings on whether the conduct in question violated the federal securities laws or the NASD rules as charged. See *Nassau Sec. Serv.* v. *SEC*, 348 F.2d 133, 135-136 (2d Cir. 1965); *Otto* v. *SEC*, 253 F.3d 960, 964 (7th Cir.), cert. denied, 122 S. Ct. 548 (2001). In addition, if the Commission finds that the sanctions imposed are "excessive or oppressive," the Commission may modify or cancel the sanctions. 15 U.S.C. 78s(e)(2). The Commission's decision is reviewable in the courts of appeals. 15 U.S.C. 78y(a).

2. Petitioner Markowski ran Global as its chairman and chief executive officer and was its majority shareholder. Petitioner Riccio was Global's head trader. Pet. App. A2. Global was an underwriter and market maker for the securities of high risk start-up com-

panies. Global's promotional brochure represented Global as "'a full-service investment banker' with a program for the 'support of emerging growth companies,' for the benefit of investors, 'that goes *well beyond* the traditional underwriting process.'" *Id.* at A3. Global's Compliance Officer, Gary Boccio, testified to his understanding of the firm's sales philosophy: "You [the investor] buy these stocks for [the] long term. We will support those companies and then your net worth will increase." *Id.* at A4.

In June 1990, Global was the sole underwriter on a firm commitment basis for the initial public offering of Mountaintop, a company that marketed Alaskan vodka. Pet. App. A3. At the time of the offering, Mountaintop was not profitable. *Ibid.* The public offering sold out the first day, and sales were made almost entirely to Global's customers. *Ibid.*

In the aftermarket trading of Mountaintop securities, Global dominated the market, and there was little or no demand for the securities other than from Global: Global was the principal market maker, the largest seller and purchaser, and regularly paid the highest prices. Pet. App. A3 & n.8, C2. Further, petitioner Riccio admitted that, although there was no demand for Mountaintop securities on the open market, "Global made the sole high bid for days, even months, on end." *Id.* at C7. Global was able to dispose of many of the Mountaintop securities that it bought by selling them to large institutional clients of petitioner Markowski (*ibid.*), but since more securities constantly came on the market, Global still accumulated a large inventory (*id.* at A4).

James Shanley, Global's chief operating officer, testified that Mountaintop securities opened "too high" and remained at high levels only because Global was

"always supporting the stock." Pet. App. C7. Boccio testified that, when he urged reduction of Global's inventory of Mountaintop, petitioner Markowski responded that "he didn't want to show we had any weakness in the stocks." *Ibid.* Petitioner Riccio admitted that he kept Global's bids high because he feared the consequences of a drop in price, including the customer complaints it would generate. *Ibid.* When Global withdrew as a market maker for Mountaintop, the market for Mountaintop collapsed, and "Mountaintop's price dropped precipitously—about 75% in one day." *Id.* at C3.

3. On September 7, 2000, the SEC sustained the findings of the NASD's National Adjudicatory Council, which had found that petitioners violated Section 10(b), Rule 10b-5, and certain NASD conduct rules in connection with Global's activities in Mountaintop and that petitioner Markowski violated NASD rules in his operation of the firm. Pet. App. A1-A12.

The Commission found that petitioners engaged in market manipulation by abusing Global's control position as principal market maker for Mountaintop. Pet. App. A5. Petitioners supported the price of Mountaintop at an artificial level by entering high bids that did not reflect genuine demand and by absorbing all unwanted securities into inventory. *Id.* at A4. The Commission found that "Global's pricing did not reflect genuine demand but merely [petitioners'] desire to maintain high price levels." *Id.* at A5. Global's quotations for Mountaintop were "published with the manipulative purpose of keeping Mountaintop prices at an artificially high level." *Id.* at A6. "Rather than destroy their customers' confidence, [petitioners] chose to keep Mountaintop prices high by manipulating the market for Mountaintop securities." *Id.* at A5. The Commis-

sion sustained the sanctions the NASD had imposed on petitioners—a censure, a bar from association with any NASD member firm, and fines of $300,000 for Markowski and $250,000 for Riccio. *Id.* at A8-A9.[1]

Petitioners filed a motion for reconsideration, which the SEC denied. Pet. App. B1-B3. The Commission reiterated its conclusion that petitioners "deliberately maintained unwarranted price levels for Mountaintop by entering high bids that did not reflect genuine demand and by absorbing all unwanted Mountaintop securities into inventory." *Id.* at B2.

4. The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's order. Pet. App. C1-C8. The court rejected petitioners' argument that their scheme could not properly be deemed "manipulative" within the meaning of Section 10(b) because it did not consist of "wash sales" or "matched sales"—which, as the court described, are transactions in which "the targeted securities are 'traded' back to the sellers themselves or among known parties to give a false appearance of sales and market interest." *Id.* at C4. The court concluded that the Commission had reasonably interpreted Section 10(b) also to proscribe manipulation accomplished through trades that, although they involve "real customers, real

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[1] The Commission also found petitioner Markowski responsible for other violations not disputed here: violating Global's agreement with the NASD to limit the firm's inventory and refusing to submit to an NASD investigative interview. Pet. App. A6-A8. In addition, Markowski had earlier been disciplined by the NASD for refusing to turn over documents during the NASD's investigation into Global's activities. *Id.* at A9 & n.19. The Commission sustained the NASD's action, and the Commission's decision was affirmed by the court of appeals. See *Markowski* v. *SEC*, 34 F.3d 99 (2d Cir. 1994).

transactions, and real money," are made to affect the price of the stock rather than for a legitimate purpose. *Id.* at C4-C6 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984)).

The court reasoned that another provision of the Exchange Act—Section 9(a)(2)—demonstrates "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose." Pet. App. C5 (citing 15 U.S.C. 78i(a)(2)). That provision makes illegal "actual or apparent" transactions in any security registered on a securities exchange if the transactions are made "for the purpose of inducing the purchase or sale of such security by others." *Ibid.* (quoting 15 U.S.C. 78i(a)(2)). The court concluded that, given "Congress's clear endorsement for sanctions against this sort of manipulation [under Section 9 for exchange-traded securities], the Commission's inclusion of it within the phrase 'manipulative . . . device' in § 10(b)"—which unlike Section 9 applies to all securities—"cannot have been unreasonable." *Id.* at C6.

The court also rejected petitioners' arguments that the fact that Global's trading in Mountaintop resulted in a net loss precluded a finding of manipulation and established that petitioners could not have acted with the scienter necessary to violate Section 10(b). Pet. App. C6-C7. The court observed that Global had an incentive to support the price of Mountaintop securities even if that action meant its trading in the securities would be unprofitable in the short run: "to maintain customer interest in Global generally and to sustain confidence in its other securities." *Id.* at C6. Moreover, "[j]ust because a manipulator loses money doesn't mean he wasn't trying." *Ibid.* "Indeed," the court observed, attempts to support the price of a security over time

are likely to "exhaust the manipulator's resources." *Id.* at C6-C7.[2]

ARGUMENT

The court of appeals correctly held that petitioners' conduct was a "manipulative * * * device" within the meaning of Section 10(b). That decision does not conflict with any decision of this Court or of any court of appeals. This Court's review is therefore not warranted.[3]

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[2] The court further held that the Commission's finding that petitioners published non-bona fide quotations in violation of an NASD rule followed "handily" from the finding of manipulation, because a non-bona fide quotation is defined in the NASD rule as a quotation published "without having reasonable cause to believe that such quotation . . . is not published for any fraudulent, deceptive or manipulative purpose." Pet. App. C3-C4. The court also affirmed the Commission's findings that petitioner Markowski violated the agreement restricting Global's inventory to no more than 200% of the firm's net capital and that petitioner Markowski failed to appear as required by NASD rules for an investigatory interview. *Id.* at C8.

[3] We do not separately address the second question that petitioners purport to present for review: whether the court of appeals' interpretation of Section 10(b) improperly "transfers the burden of proof for manipulation * * * to Petitioners who must disprove any wrongdoing." Pet. i. Petitioners do not address that question elsewhere in the petition. Nor did they raise that issue either before the Commission or in the court of appeals, and that court's decision did not address the question. The issue is thus not properly before the Court. See *EEOC* v. *FLRA*, 476 U.S. 19, 24 (1986) (the "normal practice" of this Court "is to refrain from addressing issues not raised in the Court of Appeals"); 15 U.S.C. 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."). In any event, petitioners'

1. Section 10(b) makes it "unlawful for any person, directly or indirectly, * * * [t]o use or employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. 78j(b). Rule 10b-5, which implements that provision, forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates * * * as a fraud or deceit." 17 C.F.R. 240.10b-5.

This Court has described Section 10(b) as "a 'catchall' clause to enable the Commission to 'deal with new manipulative (or cunning) devices.'" *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203 (1976); accord *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386-387 (1983); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 174 (1994). Section 10(b) and Rule 10b-5 "prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception." *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 11 n.7 (1971) (quoting *A.T. Brod & Co.* v. *Perlow*, 375 F.2d 393, 397 (2d Cir. 1967)).

The Commission has long viewed securities trades made with the intent to affect the price of the securities as a manipulative and deceptive device that is proscribed by Section 10(b) and Rule 10b-5. See, *e.g.*, *Halsey, Stuart & Co.*, 30 S.E.C. 106, 112 (1949). The courts of appeals that have addressed such manipula-

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contention that the court of appeals has somehow shifted the burden of proof is without merit.

tive schemes have likewise uniformly concluded that they violate those provisions. See *Pagel, Inc.* v. *SEC*, 803 F.2d 942, 945-946 (8th Cir. 1986); *Alabama Farm Bureau Mut. Cas. Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 611-613 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980); *United States* v. *Charnay*, 537 F.2d 341, 347-351 (9th Cir.), cert. denied, 429 U.S. 1000 (1976); *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975).

As this Court recently reiterated in *SEC* v. *Zandford*, 122 S. Ct. 1899 (2002), among Congress's objectives in adopting the Exchange Act were "to insure honest securities markets and thereby promote investor confidence," and "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus achieve a high standard of business ethics in the securities industry." *Id.* at 1903 (internal quotation marks omitted). Trades made for the purpose of manipulating stock prices subvert the integrity of the markets because their effect "is to distort the character of the market as a reflection of the combined judgments of buyers and sellers, and to make of it a stage-managed performance." *Halsey, Stuart & Co.*, 30 S.E.C. at 112. They deceive investors by creating a false impression that the prices for the manipulated securities have been "established by the free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934).

Section 10(b) proscribes intentional conduct designed to deceive investors, including any scheme to affect stock prices "beyond the operation of normal market factors." *Alabama Farm Bureau Mut. Cas. Co.*, 606 F.2d at 611. Such "[d]eceitful manipulation of the market price of publicly-owned stock is precisely one of the

types of injury to investors at which the [Exchange] Act and the Rule [10b-5] were aimed." *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967). The Commission's longstanding and consistent interpretation of Section 10(b) and Rule 10b-5 to encompass the kind of conduct engaged in by petitioners is thus reasonable and entitled to deference in the courts. See *Zandford*, 122 S. Ct. at 1903.

2. Petitioners contend that a "manipulative * * * device" under Section 10(b) encompasses only fictitious trades—in which ownership of the securities remains in the hands of the manipulators ("wash sales" and "matched sales"). There is, however, no support in the language of Section 10(b) or in this Court's decisions for such a limitation on the statutory language. Indeed, in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), cited by petitioners (Pet. 12-13), the Court described the kinds of deceptive practices encompassed by the term "manipulation" to include not only "wash sales" and "matched orders" but also "rigged prices, that are intended to mislead investors by artificially affecting market activity." 430 U.S. at 476. Trades made solely to prop up the price of a security operate to "rig" prices just as effectively as do fictitious trades because they give the false appearance of real market demand for the securities. See A.A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 401-402 (1938) (even when fictitious trades are not involved, it violates the antifraud provisions of the federal securities laws to create the appearance of an active market without disclosing to the public "that the market activity was created strictly by the persons who were selling") (citing *Coplin* v. *United States*, 88 F.2d 652 (9th Cir.), cert. denied, 301 U.S. 703 (1937)).

Moreover, as the court of appeals explained, the express language of the Exchange Act demonstrates that Congress intended to prohibit actual trading designed to rig market prices. Section 9(a)(2) makes it unlawful to engage in "actual or apparent active trading" in exchange-registered securities "for the purpose of inducing the purchase or sale of such securit[ies] by others." 15 U.S.C. 78i(a)(2). Given that express congressional prohibition on "actual" trading with the intent of affecting the market for exchange-traded securities, the court of appeals correctly concluded that the SEC reasonably interpreted Section 10(b) to proscribe such conduct with respect to non-exchange-registered securities. Pet. App. C6. The ban of manipulative devices in Section 10(b) was intended to include the practices listed in Section 9, see *SEC* v. *Resch-Cassin & Co.*, 362 F. Supp. 964, 975 (S.D.N.Y. 1973), although it is not limited to them, see *Charnay*, 537 F.2d at 350-351 (Rule 10b-5 bans manipulative trades whether or not Section 9(a)(2)'s requirement of a purpose to induce others to trade is present).[4]

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[4] Some commentators have argued that trades made with the intent to affect the price of the security but that are not fictitious should not be proscribed because, it is argued: there is no evidence that they actually affect securities prices; such schemes are self-deterring in that they cannot succeed; and enforcement efforts are too costly. See D.R. Fischel & D.J. Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv. L. Rev. 503 (1991). As the title of Fischel & Ross's article indicates, however, their argument addresses what they believe the law *should be*, not what it is. As demonstrated above in the text, Congress expressly recognized in Section 9(a)(2) of the Exchange Act the need to proscribe actual trades intended to affect the prices of securities, not just fictitious trades. Moreover, other commentators have disagreed with the premises underlying Fischel & Ross's arguments. See S. Thel, *$850,000 in Six Minutes—The Mechanics of Securities*

Petitioners incorrectly contend (Pet. 13-14) that a defendant's conduct cannot properly be deemed fraudulent for purposes of Section 10(b) based solely on his subjective intent when carrying out his actions. Just last Term, in *Zandford*, this Court held that a stockbroker's sale of his customers' securities was fraudulent in violation of Section 10(b) because he made the sale with the secret intent to keep the proceeds. 122 S. Ct. at 1905. And, in another recent decision construing Section 10(b), the Court held that the sale of an option with a secret intent not to honor it violates Section 10(b). *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588 (2001). More broadly, the principle is well-established that fraud may be based on the undisclosed intent not to perform a promise. See *Durland* v. *United States*, 161 U.S. 306, 312-314 (1896) (mail fraud); Restatement (Second) of Torts § 530 cmt. c (1977). Indeed, it is commonplace in many areas of the law, including criminal law, that legality turns on intent, motive or purpose. See *Morissette* v. *United States*, 342 U.S. 246, 250-252 (1952).

Petitioners are also mistaken in contending (Pet. 13-14) that their conduct was "fully disclosed" and therefore not deceptive. On the contrary, petitioners did not reveal to investors that they were buying up Mountaintop at high prices even though there was no retail demand for the securities and that they purchased the securities solely in order to prop up the price. Their non-disclosure left investors with the false impression that Mountaintop's prices reflected "the free and honest balancing of investment demand with investment sup-

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Manipulation, 79 Cornell L. Rev. 219 (1994) (suggesting that manipulators may profit from very small, short-lived price changes they have artificially induced).

ply," H.R. Rep. No. 1383, *supra*, at 10, created by "the combined judgments of buyers and sellers," when the prices actually reflected "a stage-managed performance." *Halsey, Stuart & Co.*, 30 S.E.C. at 112. Their conduct thus falls squarely within Section 10(b)'s prohibition on fraud in connection with the purchase or sale of securities. *Charnay*, 537 F.2d at 351 ("Failure to disclose that market prices are being artificially depressed [or increased or supported] operates as a deceit on the market place and is an omission of a material fact" actionable under Section 10(b).).

3. Also without merit is petitioners' contention (Pet. 16) that a finding of manipulation is precluded by the fact that Global ultimately lost money on its Mountaintop transactions. The decision in *United States* v. *Mulheren*, 938 F.2d 364 (2d Cir. 1991), on which petitioners rely (Pet. 16), does not support their argument. Although the court in *Mulheren* did observe that "[o]ne of the hallmarks of manipulation is some profit or personal gain inuring to the alleged manipulator," 938 F.2d at 370, it did not hold that there can be no manipulation in violation of Section 10(b) if the fraudulent scheme fails to make a profit. The court relied on the absence of profit as only one factor in many in determining that the evidence was insufficient to establish beyond a reasonable doubt that the transactions in that criminal case—which consisted of two purchase orders made within a few minutes on a single day—were made solely to raise the price of the securities involved. See *id.* at 369-372.

Even if there were a requirement that a manipulator obtain some "personal gain" from his scheme, that requirement would be met here. As the court of appeals recognized, Global supported the price of Mountaintop "not to profit from later sales of Mountaintop, but to

maintain customer interest in Global generally and to sustain confidence in its other securities." Pet. App. C6. Maintaining customer confidence in Global was the "personal gain" that petitioners sought to—and for a time did—achieve through their manipulation.

As the court of appeals understood, the fact that petitioners *ultimately* lost money on the Mountaintop scheme does not preclude a finding either of manipulation or of scienter. Manipulations that continue for an extended period often will be unsuccessful because a "protracted struggle against market fundamentals will exhaust the manipulator's resources." Pet. App. C7. That does not prevent the conduct from being manipulative and unlawful under Section 10(b). See *L.C. Wegard & Co.*, 53 S.E.C. 607, 613 (1998) (manipulation found even though the trading at issue lost money for the firm), aff'd, 189 F.3d 461 (2d Cir. 1999) (Table); *R.B. Webster Investments, Inc.*, 51 S.E.C. 1269, 1274 (1994) (it is not inconsistent with a finding of intent to manipulate that the manipulator failed to profit, or even lost money).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

GIOVANNI P. PREZIOSO
General Counsel

MEYER EISENBERG
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

SUSAN S. MCDONALD
Senior Litigation Counsel

SUSAN K. STRAUS
Attorney
Securities and Exchange Commission

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In The

Supreme Court of the United States

October Term, 2001

MICHAEL J. MARKOWSKI AND JOSEPH F. RICCIO,
Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The District of Columbia

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Petitioners Reply to Brief in Opposition

WILLIAM VANDERCREEK
215 South Monroe Street, Level P3
Post Office Box 1328
Tallahassee, Florida 32302
(850) 561-9147 Telephone/FAX
(850) 893- 0719 FAX

Counsel for Markowski and Riccio

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ARGUMENT

I. PURPOSE OF PETITIONERS REPLY

The purpose of this Reply is two fold. First, to clarify the difference between the Question presented by Petitioners ad the Question as worded by the Respondent S.E.C. Second, to clarify that neither the Court of Appeals opinion nor the S.E.C. decision was predicated upon a finding of non-disclosure. The basis of both rulings was artificially high bids.

II. PETITIONERS QUESTION BASED UPON EXPRESS RULING OF DISTRICT OF COLUMBIA

The cardinal difference between the Petitioner's request for certiorari and the Respondent S.E.C.'s Brief in Opposition centers upon the express basis for the Court of Appeals for the District of Columbia's ruling. The Questions Presented by Petitioners were directly predicated upon the pronouncement of the opinion:

> ... Whatever the practical concerns, we cannot find the Commission's interpretation to be unreasonable in light of what appears to be Congress's determination that "manipulation" can be illegal solely because of the actor's purpose.

S.E.C., 274 F.3d 525 (D.C. Cir. 2001) (App. C-5)

The first Question Presented by Petitioners stated:

> Whether the ruling manipulation can be illegal solely because of the actor's purpose conflicts with decisions by this Court requiring, among other matters, scienter and deception that are in accord with determinations by Congress.

Petition for Certiorari, p. i.

In contrast to the District of Columbia's opinion and the Question Presented by Petitioner, the S.E.C. would frame the question:

> Whether securities transactions that are made with the undisclosed intent to maintain the market price at an artificially high level and thereby to create the false appearance of genuine investor demand are proscribed by Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

Brief in Opposition, p. i.

The Mountaintop bids, however, were

acknowledged by the District of Columbia to be real in all respects, real trades, real sales, real prices, and real customers. *Michael J. Markowski and Joseph P. Riccio v. S.E.C.*, 274 F.3d 525, 528. (App. C- 4) The concept that the bids were non-bona fide was entirely predicated upon the stock being manipulated. The arguments of the S.E.C. below to the District of Columbia claimed that the stock was manipulated because the bids were artificial. Thus, the Question Presented, as phrased by the S.E.C., relies upon the assumption of "artificially high" bids resulting in self-proving charges of manipulation and non-bona fide bids that Petitioners must disprove. This is the reason for Petitioner's second Question Presented:

> Whether the ruling that manipulation can be found based solely on the subjective determination of the actor's intent effectively transfers the burden of proof for manipulation and for non-bona fide bids to Petitioners who must disprove any wrongdoing.

Petition for Certiorari, p. i.

Respondent's Brief in Opposition expressly stated that the second Question Presented by Petitioner should be ignored because:

> Petitioners do not address that question elsewhere in the petition. Nor did

> they raise that issue either before the Commission or in the court of appeals, and that court's decision did not address the question. The issue is thus not properly before the court.

Respondent's Brief in Opposition, p. 8, at FN 3.

With all due respect, the issue was extensively argued in the Petition for Writ of Certiorari as well as to the National Adjudicatory Council of NASD, the Securities and Exchange Commission, and to the United States Court of Appeals for the District of Columbia Circuit.

As stated in the Petition:

> Petitioners argued to the Court of Appeals that the S.E.C. ruling relied upon a circular thesis that the bids were non-bona fide because the stock was manipulated and that the stock was manipulated because the bids were non-bona fide. This merry-go-round resulted in reciprocating self-proving charges that had the effect of placing the burden on Petitioners to disprove both charges.

Petition for Certiorari, p. 7; *see also id* at pp. 7, 11, 15, 19- 20.

III. RULING OF BELOW BASED UPON "ARTIFICIALLY HIGH" BIDS, NOT NON-DISCLOSURE

The S.E.C.'s case on manipulation is completely dependent upon the assumption that the bids were "artificial," yet it fails to delineate an adequate method for defining, measuring, and/or determining "artificially high" prices. The express basis for the S.E.C. ruling proclaims:

> We have found that the bids for Mountaintop were published with the manipulative purpose of keeping Mountaintop prices at an artificially high level. We accordingly sustain NASD's findings of violation.

Decision and Order of the Securities and Exchange Commission, September 7, 2000. (App. A-6).

There was no direct evidence that the bids were "artificial" or "artificially high". Mere allegations of non-bona fide bids cannot be used as the basis to prove that the stock was manipulated. The term "artificial" is catchy, but must be defined and accompanied by a finding of the "non-artificial" price:

> Forcing security prices to an artificial level has intuitive appeal because creation of artificial prices, unlike trading, is socially

> undesirable. For this formulation to be operational, however, **one must be able to define the difference between an artificial and non-artificial price.** This task turns out to be much more difficult than it might at first appear....

Daniel R. Fischel and David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Market?*, 105 Harvard Law Review 503, 508 (1991)(emphasis added).

Both the S.E.C. and the Court of Appeals for the District of Columbia acknowledge that the traditional bases for finding bids to be non-bona fide are not present, and the S.E.C. does not claim hindsight as a valid legal standard for determining whether bids were too high; yet, in reality, this is the standard used. Without a valid legal standard in which to measure "artificially high bids", the ruling upholds an assertion of manipulation based upon the assumption that bids resulting in real sales to real customers at real prices were "artificial".

Respondent's Brief in Opposition now attempts for the *first time* to argue non-disclosure:

> ... petitioner did not reveal to investors that they were buying up Mountaintop at high prices even though there was no retail demand for the securities and that they purchased the securities solely

in order prop to up the price.

See Brief in Opposition, p. 13.

The non-disclosure argument in the Respondent's Brief in Opposition is not based on any finding of non-disclosure expressed in the District of Columbia Circuit's opinion, or in the ruling of the S.E.C. (App. A, B, and C). The S.E.C. counsel apparently assumes their nondisclosure argument should be implied from their "artificially high" bids argument.

Petitioners did not make the disclosure now demanded by the S.E.C. in it's Brief in Opposition because it is not correct. Global had believed Mountaintop would become a viable company. Inventory was often flat and large sales were made to large institutional accounts. Global's trading in Mountaintop securities paralleled the NASDAQ index. The bid/ask price for Mountaintop was disclosed, the trading volume was disclosed. Global was recording real trades which did deceive anyone about the level of activity. The fully disclosed conduct of Global was not deceptive. As required under NASD regulations, it was disclosed that Global was the dominant market maker in Mountaintop securities. It was also fully disclosed that Mountaintop was a newly formed company with no earnings. The Initial Public Offering was made as a high-risk security to qualified buyers.

The express ruling of the District of Columbia and

the S.E.C. was not that Global's activities were hidden, and therefore deceptive, but that they were improperly motivated. But, that is simply not the test. Impure, or even optimistic thoughts (that Mountaintop would succeed and the stock would increase in value) do not turn disclosed conduct into fraud. The entire basis of the S.E.C.'s opinion finding the bids were non-bona fide was its unsubstantiated belief that the Mountaintop securities had been "manipulated" by purchases and sales at artificially high prices by Global as the dominant market maker. There are far too many ambiguities, uncertainties, and assumptions about undefined "artificially high" bids in this case. The current state of the law does not adequately address these issues.

The S.E.C. would dismiss the thesis of Fischel & Ross that Petitioners have argued to this Court and to the District of Columbia:

> As the title of Fischel & Ross's article indicates, however, their argument addresses what they believe the law *should be*, not what it is. ... Moreover, other commentators have disagreed with the premises underlying Fischel & Ross's arguments. ...

Brief in Opposition, p. 12 FN 4.

This is precisely why this Court should grant certiorari. The Court of Appeals of District Columbia ruled manipulation

was proven because of "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose." *Michael J. Markowski and Joseph P. Riccio v. S.E.C.*, 274 F.3d 525, 529 (D.C. Cir. 2001) (App. C-5).

Petitioners contend this ruling conflicts with existing Supreme Court decisions. The S.E.C. is seeking to conclusively uphold the charges of manipulation and of non-bona fide bids based upon the circular and undefined assumption that the bids were artificially high.

Respectfully submitted,

William VanDercreek
215 South Monroe Street, Level P3
Post Office Box 1328
Tallahassee, Florida 32302
(850) 561-9147 Telephone/FAX
(850) 893- 0719 FAX